

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

D-142

No. 03-3477 & 04-2921

Terence Culpepper, Appellant

v.

Mary Jean Culpepper, et al.

(D.C. of NJ Civil Nos. 02-cv-02962 & 02-cv-03902

AFFIDAVIT OF APPELLANT

TERENCE CULPEPPER, Appellant *pro se*, being
duly sworn and upon his oath, says as follows:

1. I am the Appellant in the above-captioned matter. I make these statements upon personal knowledge.
2. On December 30, 2004, the Court granted my motion to file a Consolidated Brief and Appendix, also construed as a motion to Stay the Appeals pending the Appeal in the Superior Court of New Jersey and to Stay the Briefing Schedule. For the Court's convenience, a copy of the Order is appended hereto as "Exhibit A."
3. In addition to the stay of this appeal, the Order provided, in relevant part, that "Counsel for appellant is directed to file with the Clerk's Office a written status report within 45 days from the date of this order, and every 45 days thereafter, until the Superior Court proceedings have been concluded."
4. I understood the order to mean that my attorney who is handling the State court appeal was to file the status report. I forwarded the Court's Order to my state court attorney, Leslie Stolbof Sinemus, Esq. with the understanding that she would file the report. I did not understand that because she is not my attorney of record in this Court, that she cannot file documents on my behalf in this Court.
5. I have since learned that she has been in ill health, and she did not respond to my request to file the

status report pursuant to the Court's Order. A certification of Mrs. Sinemus is appended hereto as "Exhibit B."

6. Additionally, and to my serious distress and dismay, I learned that because Mrs. Sinemus has been ill, she has not timely filed the brief to pursue my appeal in the Superior Court, and it has been dismissed. This was through no fault of my own and I did not know before last week that the appeal was dismissed.

7. Mrs. Sinemus has returned to work full time, having received and continuing to receive treatment for her condition, and she has assured me that she is immediately moving to reinstate my appeal and move my case forward. See, certification of Mrs. Sinemus, attached hereto.

8. I respectfully request that this Court continue the stay, despite the temporary status of the appeal as dismissed, based upon Mrs. Sinemus's representations that she is immediately moving to have the appeal reinstated, and based upon the fact that the temporary status as dismissed is due to her illness, and not due to any fault or lack of effort on my part. We will, of course, report to the Court as to all developments in the Superior Court case, as they occur or as this Court directs.

S/ Terence Culpepper, Appellant *pro se*

Sworn to and Subscribed before me
this 14th day of March, 2005

S/ LESLIE STOLBOF SINEMUS, ESQ.
Attorney at Law, State New Jersey

End Page
Exhibit A

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

D-142

No. 03-3477 & 04-2921

Terence Culpepper, Appellant

v.

Mary Jean Culpepper, et al.

(D.C. of NJ Civil Nos. 02-cv-02962 & 02-cv-03902

CERTIFICATION OF LESLIE STOLBOF
SINEMUS

LESLIE STOLBOF SINEMUS hereby certifies and
says:

1. I am an attorney at law in the State of New Jersey. I represent Mr. Terence Culpepper as appellant in his appeal of a state court conviction, which appeal was docketed as A-6070-02T3.

2. By way of background, I was admitted to the New Jersey bar in 1979, clerked in the Appellate Division of the New Jersey Superior Court, joined the Essex County Prosecutor's Office from 1980 until 1987. Upon entering private practice I concentrated on criminal defense work along with commercial litigation. In 1995 I became a member of the Association of Criminal Defense Lawyers - NJ, and in 2000 I was elected to the Board of Trustees of that organization. I have chaired their *Amicus* committee for the last three years. In addition to the administrative duties of the committee, I also represented the ACDL-NJ in its *amicus* petition in State v. Thomahl Cook, 179 N.J. 533; 847 A. 2d 530 (2004) in which, in January, 2004, we argued to the Court that any interrogation preceding a confession must be recorded to properly preserve the evidence of voluntariness or lack thereof. Now, for the first time, and as a result of the Cook decision, there is a New Jersey Supreme Court committee working on

recommendations concerning the implementation of such a rule.

3. Unfortunately, shortly after the argument in Cook a number of influences began to negatively impact my life, and as a solo practitioner, my practice. I had to go to Florida for several weeks to handle affairs pertaining to my mother who is nearly 81 years old. Upon my return from Florida, I had to file a letter-memorandum in the Cook case in emergent response to the Attorney General's promulgating new guidelines wherein police and prosecutors were directed to record (only) confessions, in only homicide cases, in an explicit effort to influence the Court's anticipated decision. When I finished the memorandum, I was sick, with a double ear infection coupled with vertigo, and sinus infection, which condition has returned no less than six times in the last eight months. Each recurrence forced me out of work for a week or more, and the recovery both in terms of my health and the health of my practice, has been arduous. In October, 2004, I went to St. Barnabas Hospital due to chest pains, and was admitted for four days. While the discomfort was not cardiac related, I was advised that it was a gastro-intestinal disorder directly related to stress. Finally, I have been diagnosed with excess potassium in my blood, which has apparently been causing a whole host of difficulties again making my performance less than optimum. My doctor has not yet determined the cause of this imbalance, and my blood must be monitored frequently as this situation can, as I now know, actually be fatal if not controlled.

4. During this difficult period, Mr. Culpepper's appeal was dismissed. I should not have allowed that to happen and assume full responsibility. It is in no way Mr. Culpepper's fault and he should not be prejudiced as a result of my difficulties.

5. I am intending to move to have the appeal in the state court reinstated in the immediate future. I anticipate that the Court (NJ) will insist that the brief be filed along with any motion to reinstate, and I anticipate having the brief ready to file, along with the motion, by early next week (the week of March 21st) if not sooner.

6. I now realize that this Court has stayed the proceedings in Mr. Culpepper's matters before the Third Circuit. Before Mr. Culpepper forwarded me this Court's Order of December 30, 2004, I was unaware that a Third Circuit matter was dependant upon the appeal in the Superior Court. Nonetheless, I apologize to this Court for the delay and for any other inconvenience that may have been caused. Although I am not before this Court in that I do not represent Mr. Culpepper in this litigation, I would still urge the Court to continue the stay entered on December 30, 2004, so that no prejudice inures to Mr. Culpepper as a consequence of my difficulties.

I hereby certify that the foregoing statements made by me are true and that I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

S/ Leslie Stolbof Sinemus, Esq. 1060
76 South Orange Avenue
South Orange, New Jersey 07079
973-275-5060

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT
Nos. 03-3477 & 04-2921

TERENCE CULPEPPER

v.

MARY JEAN CULPEPPER; JAMES O'CONNOR,
CHIEF; MARK PIERCY, OFFICER; FRANK
FIORI, OFFICER; BRIAN COGLIN, OFFICER;
JOHN CONTE, JR.; BOROUGH OF OAKLAND;
BOROUGH OF OAKLAND POLICE
DEPARTMENT; ROBERT HAMMERLE,
OFFICER

On Appeal from the United States District Court for
the District of New Jersey

(D.C. Civil No. 02-cv-02963)

District Judge: Honorable William J. Martini

TERENCE CULPEPPER

v.

MARGUERITE SIMON, JUDGE; REM LAW
GROUP; JOSEPH REM; ROBERT ZELLER; ERA
BURGDORF REALTORS; MARY ELLEN
FLANNERY; RANDOLPH WINE; PETER
JEFFER; FRANK RISSE; TERESA DOYLE

Terence Culpepper, Appellant

On Appeal from the United States District Court for
the District of New Jersey

(D.C. No. 02-cv-03902)

District Judge: Honorable William J. Martini

Before: RENDELL, FISHER and V AN
ANTWERPEN, Circuit Judges

SUR PETITION FOR REHEARING

The petition for panel rehearing filed by pro se Appellant in the above-entitled case having been submitted to the panel, and no member of the panel having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

S/ Franklin S. Van Antwerpen Circuit Judge

Dated: September 8, 2005

SLC/cc:

Terence Culpepper

Christopher C. Botta,

Esq. John R. Altieri, Esq.

Ian C. Doris, Esq.

Diane M. Lamb, Esq.

Michael R. Scully, Esq.

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

August 19,2005

No. 03-3477 & 04-2921

Terence Culpepper, Appellant v.

Mary Jean Culpepper, et al.

(DCNJ Civil Nos . .02-02926 & 02-039.02)

Present:

VANANTWERPEN, Circuit Judge

Motion by Appellant for Leave to File Exhibits to
Petition for Rehearing.

S/ Shannon L. Craven

Case Manager (267)299-4959

ORDER

The foregoing motion by Appellant for Leave to File
Exhibits to Petition for Rehearing is granted. The
clerk is directed to file Appellant's Petition for
Rehearing.

By the Court,

S/ Franklin S. Van Antwerpen Circuit Judge

Dated: August 23,2.0.05

LC/cc: Mr. Terence Culpepper

Christopher C. Botta, Esq.

John R. Altieri, Esq.

Ian C. Doris, Esq.

Diane M. Lamb, Esq. Michael R. Scully, Esq.

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT
B-110

June 9, 2005

Nos. 03-3477 & 04-2921
Terence Culpepper, Appellant v.
Mary Jean Culpepper, et al.
(DCNJ, Civil Nos. 02-03902 & 02-2963)

Present:
RENDELL, FISHER, and VANANTWERPEN,
Circuit Judges.

- 1) Letter by Appellees, Borough of Oakland, Oakland Police Department, James O'Connor, Robert Hammerle Mark Piercy, Frank Fiore, Brian Coglin and John Conte, construed as a Motion for Leave to Dismiss Appeals;
- 2) Letter by Appellees, Era Burgdorf Realtors, Mary Ellen Glannery and Randolph Wine joining Motion to Dismiss Appeals;
- 3) Letter by Appellees, Rem Law Group, Joseph Rem, Robert Zener, Frank Risse and Catherine Risse, joining Motion to Dismiss Appeals;
- 4) Letter by Appellee, Peter A. Jeffer, Esq., joining Motion to Dismiss Appeal.

S/ Shannon L. Craven
Case Manager (267)299-4959

ORDER

The foregoing letters of Appellees which are deemed to be motions to dismiss are GRANTED. This Appeal is DISMISSED.

By the Court,

S/ Franklin S. Van Antwerpen Circuit Judge

Dated: July 18,2005

SLC/cc:

Mr. Terence Culpepper

Christopher C. Botta,

Esq. John R. Altieri, Esq.

Ian C. Doris, Esq.

Diane M. Lamb, Esq.

Michael R. Scully, Esq.

End Page

Exhibit E

State of New Jersey
Office of the Attorney General
Department of Law and Public Safety
Division of Criminal Justice
PO Box 086
Trenton, NJ 08625-0086
Telephone: (609) 984-6500

Peter C. Harvey
Attorney General

Vaughen L. McKoy
Director

May 19, 2005

The Honorable John L. Molinelli Bergen County
Prosecutor
Bergen County Justice Center
10 Main Street, Room #215 Hackensack, New Jersey
07601
Re: State v. Terence Culpepper
Docket No. A-6070-02T3

Dear Prosecutor Molinelli:

This office has reviewed the appellant's brief in the above matter and has determined that this appeal should be referred to your office for handling. Enclosed please find appellant's brief, appendix and transcripts as served upon this office. By agreement with the Court, your brief will be due in the Appellate Division 40 days from the date of this letter, unless you advise the Court of circumstances warranting a different date.

Unless there is a problem with your office handling this case, we request that you assign it to a

member of your staff and notify this office of the assigned attorney. We also request that when your brief is filed, a copy be forwarded to the Appellate Bureau. In the event that any issue of statewide significance is uncovered please notify me as soon as possible to give us the opportunity to review the issue and determine if our participation would be warranted. Also we request that in the event of any adverse decision, we be immediately notified. Finally, if we can be of any assistance in the preparation of this appeal please feel free to contact this Bureau. By copy of this letter we are notifying the Appellate Division and appellant of the above, and requesting that all future correspondence in this matter be forwarded to the prosecutor. Thank you for your assistance and cooperation.

Very truly yours,
S/ Boris Moczula
Assistant Attorney General Chief, Appellate Bureau

as enclosure
cc: James M. Flynn, Clerk, Appellate Division Leslie
Stolbof Sinemus, Esquire

End Page
Exhibit F

Jun-17-05 16:29

ORDER ON MOTION

STATE OF NEW JERSEY vs
TERRENCE J CULPEPPER

MOTION FILED: MAY 09, 2005
BY: TERENCE CULPEPPER
ANSWER(S) FILED:

SUBMITTED TO COURT: JUNE 13, 2005

ORDER

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -006070-02T3
MOTION NO. M -004973-04
BEFORE PART: L
JUDGE(S): SKILLMAN

BY: TERENCE J CULPEPPER

THIS MATTER HAVING BEEN DULY
PRESENTED TO THE COURT, IT IS ON THIS
14th DAY OF June , 2005, HEREBY ORDERED
AS FOLLOWS;

MOTION BY APPELLANT
- TO VACATE THE DISMISSAL AND
REINSTATE THE APPEAL
- TO FILE APPELLANT BRIEF NUNC PRO
TUNC

BER 02-02-261-1
GRANTED DENIED
(x)

**FOR THE COURT:
STEPHEN SKILLMAN PJAD.**

**End Page
Exhibit G**

Terence Culpepper
100 Rock Road Apt. 87
Hawthorne, New Jersey 07506

March 14, 2005

Marcia Waldron, Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Court House
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: Terence Culpepper v. Mary Jean Culpepper, et
al. Docket Numbers 03-3477 & 04-2921

Dear Ms. Waldron:

Pursuant to the Courts Order of December 30, 2004,
enclosed please find the status report concerning the
appeal of my case in the New Jersey Superior Court,
Appellate Division. Kindly file this with the Court;
my case manager is Shanon L. Craven.

A copy of this has been forwarded to all the attorneys
of record, by certified mail, return receipt requested.
Thank you for your courtesy.

Very truly yours,
s/Terence Culpepper Appellant, pro se

cc: Christopher C. Botta, Esq.
John R. Altieri, Esq.
Ian C. Doris, Esq.
Diane M. Lamb, Esq.
Michael R. Scully, Esq.

End page
Exhibit H

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

D-142

August 10, 2004

No. 03-3477 & 04-2921 Terence Culpepper,
Appellant v. Mary Jean Culpepper, et al

(D.C. of NJ Civil Nos. 02-cv-02962 & 02-cv-03902)

Present: MCKEE and RENDELL, Circuit Judges.

1) Motion by Appellant for Extension of Time to file Consolidated Brief and Appendix, which the Court may wish to construe as a Motion to Stay Appeals Pending Appeal in Superior Court of New Jersey and Request to Stay Briefing Schedule;

2) Response by Appellees, Rem Law Grp, Joseph Rem, Robert Zener, Frank Risse, and Catherine Risse, in Opposition to Motion by Appellant;

3) Response by Appellees, Oakland, Oakland Police, James O'Connor, Robert Hammerle, Mark Piercy, Frank Fiori, Brian CogEn and John Conte, in Opposition to Motion by Appellant.

Clerk's Order dated 8/10/04.

/s/ Shannon L. Craven

Case Manager (267)299-4959

ORDER

The foregoing motion is GRANTED. The within appeal is stayed pending ruling by the Superior Court of New Jersey regarding appellant's conviction. Counsel for appellant is directed to file with the Clerk's Office, a written status report within 45 days from the date of this order, and every 45 days thereafter, until the Superior Court proceedings have been concluded. Appellant's brief shall be due 45 days after such ruling is issued by said court.

By the Court,

S/ Marjorie O. Rendell Circuit Judge

Dated: December 30, 2004

SLC/cc: Mr. Terence Culpepper

Christopher C. Botta, Esq.

John R. Altieri, Esq.

Ian C. Doris, Esq.

Diane M. Lamb, Esq.

Michael R. Scully, Esq.

End page

Exhibit I

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TERENCE CULPEPPER,

Plaintiff,

Civil Action No: 02 CV 2963 02
CV 3902

MARYJEAN CULPEPPER,

et. al., Defendants.

OPINION

Terence Culpepper
P.O. Box 105
Oakland, New Jersey 07436
pro se

Maryjean Culpepper
5 Webb Ct.
Park Ridge, New Jersey 07656-2426
pro se

Christopher C. Botta
Huntington Carver, L.L.P.
312 Kinderkamack Road
Westwood, New Jersey 07675

Diane M. Lamb
Office of the New Jersey Attorney General
25 Market Street

P.O. Box 112
Trenton, New Jersey 08625-0112
John Altieri
25 East Salem Street
P.O. Box 279
Hackensack, New Jersey 07602-0279

Michael R. Scully
20 Court St. 2nd Floor
Hackensack, New Jersey 07601

MARTINI, DISTRICT JUDGE:

Presently before this Court are motions to dismiss the two consolidated complaints filed on behalf of the following Defendants: Judge Marguerite Simon, Judge Bruce Gaeta, Rem Zeller Law Group, Joseph Rem, Robert Zeller, Theresa Doyle, ERA Burgdorf Realtors, Mary Ellen Flannery, Randolph Wine, Peter Jeffer, Mary Jean Culpepper, Bergen County, Frank Risse, and Catherine Risse. In addition, a Motion for Summary Judgment was filed on behalf of Defendants Captain Robert Hammerle, Chief James O'Connor, Borough of Oakland, Officer Mark Piercy, Borough of Oakland Police Department, Officer Frank Fiori, John Conte, Jr., and Officer Brian Coglein. The allegations in each separate complaint (02-CV-2963 and 02-CV-3902) are connected to events that transpired after the death of Hugh Stephen Culpepper, the father of Plaintiff Terence Culpepper and one of the Defendants, Mary Jean Culpepper. Following the father's death, brother

and sister Culpepper were named executors of the estate, which consisted of the deceased's home where Plaintiff resided at the time of his father's death. The complaints filed by Terence Culpepper arise from inter-familial disputes regarding the appropriate handling of the Culpepper estate.

STANDARDS OF REVIEW

A. Motion to Dismiss

In deciding a motion to-dismiss under Federal Rules of Civil Procedure 12(b)(6), the Court must accept as true all allegations made in the complaint, and construe the allegations in the light most favorable to the plaintiff. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Trump Hotels & Casino Resorts Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998). In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the plaintiffs claims are based on those documents. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). If it appears that no relief could be granted "under any set of facts which could prove consistent with the allegations," then a court may dismiss a complaint for failure to state a claim. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). With respect to a *pro se* litigant, the court must "find it is clear 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Zynn v. O'Donnell*, 688 F.2d 940, 941 (3d Cir. 1982).

B. Summary Judgment

Summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celetox Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, a Court must construe the facts and inferences in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, only disputes over those facts "that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Once the moving party has carried its initial burden of demonstrating the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. No issue for trial exists unless the nonmoving party can adduce sufficient evidence favoring it such that a reasonable jury could return a verdict in that party's favor. *Anderson*, 477 U.S. at 249.

DISCUSSION

A. Complaint Against Municipal Defendants (02-C V-2963)

On June 22, 2001, at Defendant Mary Jean

Culpepper's request, Defendant Officers Hammerle, Piercy and Fiori accompanied her to the Culpepper house.¹ When the Defendants arrived, Plaintiff, who was living at the house, explained to them that because some of his personal property had been stolen from the house, Defendant Mary Jean Culpepper "was not entitled to unannounced visits whenever she pleased." 02-CV-2963 Complaint, at ¶ 17. The Defendant Officers eventually left, but Defendant Mary Jean Culpepper remained at the house. Later that same day, Defendant the Borough of Oakland Police Department received a call from Defendant Mary Jean Culpepper, who reported that she was at the Culpepper home and that the Plaintiff had threatened to kill her at gunpoint. The Defendant Officers were dispatched to the scene, and Plaintiff Culpepper was arrested. He was charged with the following:.

¹The Complaint contains allegations that certain Defendants appeared at the Culpepper house on other days prior to June 22, 2001. However, it does not appear that this conduct is associated with the constitutional violations that Plaintiff alleges. 1) threatening to kill Defendant Mary Jean Culpepper or placing her in imminent fear of death, in violation of N.J.S.A. 2C:12-3b; (2) unlicensed possession of an assault firearm, in violation of N.J.S.A. 2C:58-5, 2C:58-12, 2C: 58-13, and 2C:39-5f; and (3) possession of a large capacity ammunition magazine in violation of N.J.S.A. 2C:39-3j.

Municipal Defendants' Stmt. of Facts, at ¶ 10. The weapons possession charges later were dismissed. See 02-CV-2963 Complaint, at ^ 39. On April 10, 2003, Plaintiff was found guilty of violating N.J.S.A. 2C: 12-3(b), "Terrorist Threats," by a jury in the Superior Court, Criminal Part, Bergen County. See Certification of Christopher Botta ("Botta Cert."), at ¶ 3. Prior to his conviction, Plaintiff filed a civil rights complaint in federal court alleging false arrest, malicious prosecution, and other constitutional violations.

AL Section 1983 False Arrest Claim Against Municipal Defendants

Plaintiffs complaint (02-CV- 2963) alleges a claim for false arrest under Section 1983 against the Defendant Officers. A Section 1983 claim requires a plaintiff to show that a defendant who acted under the color of state law deprived him or her of a constitutional or federal statutory right. *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002). To succeed on a Section 1983 false arrest claim, Plaintiff must show that the police did not have probable cause to arrest. *Groman v. Township of Manalapan*, 47 F.3d 628, 634 (3d Cir. 1995). Probable cause exists when police officers rely upon trustworthy information that would lead a reasonably prudent person to believe the arrested party committed the crime. *Id.* An officer acting with probable cause, even if such a belief is mistaken, is entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). On a motion for summary judgment, the court may find "that probable cause exists as a matter of law if the evidence viewed most favorably to Plaintiff would not support a contrary factual finding." *Merkle v. Upper Dublin High School*, 211 F.3d

782, 788-89 (3d Cir. 2000).

In the present case, the Defendant officers contend that they were dispatched to the Culpepper house on June 22, 2001, after Defendant Mary Jean Culpepper called the Borough of Oakland Police Department to report that her brother had threatened to shoot her with a gun. *See* Municipal Defendants' Stmt. of Facts, at ¶ 4. Officer Hess arrived first on the scene, observed Plaintiff driving away from the house, and ordered him to stop. *See id.* at ¶ 6.² After Plaintiff complied with this order, he was advised to remain in his vehicle with his hands outside of the window. *See id.* at ¶ 8. Once other police units arrived, Plaintiff was placed under arrest. At the time of his arrest, Plaintiff informed the officers that there were weapons in his vehicle. A rifle and handgun were found on the rear seat. *See id.* at ¶ 9.

The Court has thoroughly reviewed Plaintiff's submissions, including *the pro se* complaint and Plaintiff's "Statement of Material Facts," and concludes that Plaintiff has failed to raise a genuine issue of material fact as to whether the Defendant Officers acted with probable cause. Plaintiff does not dispute that on June 22, 2001, Mary Jean Culpepper called the Borough of Oakland police department and reported that Plaintiff had threatened her with a weapon. Furthermore, Plaintiff does not dispute that he drove away from the Culpepper house as one of the officers arrived at the scene, or that the officers found weapons in his car when they detained him. Significantly, Plaintiff does not deny that he threatened his sister with harm. In short, Plaintiff neither contests Defendants'

factual assertions nor offers a competing version of the facts leading up to his arrest. Plaintiffs complaint scarcely mentions the events directly preceding his arrest, and thus the complaint provides little insight into Plaintiffs version of events.³

When viewed in light most favorable to the Plaintiff, the factual record establishes that the Defendants had probable cause to arrest Plaintiff on June 22, 2001. It was appropriate for the Officers to rely upon the information that Mary Jane Culpepper provided the Borough of Oakland dispatcher - namely, that Plaintiff had threatened to cause her harm and was armed with a weapon. This information afforded the Defendant Officers with a sufficient basis to stop and detain Plaintiff after he left the Culpepper house as the Defendant officers arrived at the scene. Furthermore, when the Defendants detained Plaintiff, they found a firearm lying on the backseat of the car, and, subsequently, Plaintiff told the Defendants that another gun was in the car. Given the totality of the circumstances, the facts available to the Defendant Officers at the time of Plaintiffs arrest are "sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Sharrar v. Felsing*, 128 F.3d 810, 817 (3d Cir. 1997). Accordingly, the Defendant Officers acted with probable cause when they arrested Plaintiff for violating the weapons possession statutes and for threatening to harm Mary Jean Culpepper.⁴

³Paragraphs 39 and 40 of the Complaint mention the weapons possession charges in the context of accusing the Defendants of failing to ask Plaintiff his version of the events. It is not clear if the

"event" to which Plaintiff refers is the day of his arrest, or some other day when police officers had been called to the Culpepper house. The Complaint identifies a number of dates, both prior to and after June 22, 2001, at which time Plaintiff had contact with the Defendant Officers.

⁴Presumably in reference to the false arrest claim, Plaintiff asserts that "[n]one of the defendant's [sic] named above investigated any of the charges against me." Plaintiffs Memorandum, at p. 2. Even assuming the truth of this statement, the issue of whether the Defendant police officers conducted an investigation after Plaintiffs arrest is immaterial to whether probable cause existed at the time of Plaintiff's arrest. Thus, this assertion does not provide a disputed issue of material fact which would defeat Defendants' motion of summary judgment on the false arrest claim.

⁵Specifically, the provision under which Plaintiff was convicted states that a "person is guilty of a crime in the third degree if he threatens to kill another with purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." N.J.S.A. 2C:12-3(b).

**A2. Section 1983 Malicious Prosecution Claim
Against Defendant John Conte, Jr.**

Plaintiff alleges that John Conte, Jr., maliciously prosecuted him on the charges for which Plaintiff was arrested. In order to succeed on a malicious prosecution claim, Plaintiff must demonstrate that: "(1) defendants initiated a criminal proceeding against [him]; (2) which resulted in a seizure; (3) the criminal prosecution ended in [his] favor; (4) the criminal prosecution was initiated without probable cause; and (5) defendants acted maliciously or for a purpose other than bring the criminal defendant to justice." *Luthe v. City of Cape May*, 49 F. Supp.2d 380, 392 (D.N.J. 1999) (citing *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998)). With respect to the third element of a malicious prosecution claim, a convicted plaintiff must show that his conviction has been either reversed, expunged, declared invalid, or is under review by a writ of habeas corpus in order to bring a claim for damages. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

In the present case, on April 10, 2003, a jury in Superior Court, Criminal Part, Bergen County found Plaintiff guilty of violating N.J.S.A. 2C:12-3(b), the statute prohibiting "Terroristic Threats."⁵ See Botta Cert., at ^|3. There is no evidence that this conviction has been reversed, expunged, declared invalid, or granted review by a writ of habeas corpus. Moreover, there is no allegation or evidence that the conviction was obtained through fraud, perjury or corruption. Under these circumstances, Plaintiff has not satisfied one of the

essential elements of a malicious prosecution cause of action, and thus summary judgment is appropriate for Plaintiffs judgment on the false arrest claim.

⁵ Specifically, the provision under which Plaintiff was convicted states that a "person is guilty of a crime in the third degree if he threatens to kill another with purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." N.J.S.A. 2C:12-3(b).

claim against Defendant Conte for the terrorist threats' prosecution.

In his opposition brief, Plaintiff does not mention his arrest and prosecution for terroristic threats, but rather focuses on the weapons possession charges asserted against him. More specifically, Plaintiff claims that Defendant Conte should have investigated these charges prior to presenting the case at the probable cause hearing. Defendants contend that Conte is entitled to absolute immunity from liability.

Prosecutors are absolutely immune for actions performed in their official functions. *Imbler v. Pachtman*, 424 U.S. 430-31 (1976). Absolute immunity applies to all acts that are "intimately associated with the judicial phase of the criminal process." *Id.* at 430. By contrast, a prosecutor acting in an administrative or investigative capacity is protected by qualified immunity. *Id.* at 431 n.33.

To determine whether a prosecutor's conduct is shielded by absolute immunity, courts engage in a "functional" analysis, which looks to the nature of the function performed. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (internal quotations omitted). In the present case, Defendant Conte's decision to initiate a criminal prosecution and to present evidence at a probable cause hearing are typical prosecutorial activities, and thus are protected by absolute immunity. Accordingly, summary judgment is granted in favor of Defendant Conte on all allegations of malicious prosecution for the weapons charges.

A3. Section 1985 and 1986 Claims Against Municipal Defendants

Plaintiff appears to allege a Section 1985 complaint against the Defendants. A Section 1985 claim requires proof of a conspiracy motivated by discriminatory animus, as well as an overt act and an injury. *White v. Williams*, 179 F.Supp. 2d 405, 421 (D.N.J. 2002) (citing *Lake v. Arnold*, 112 F.3d 682, 685 (3d Cir. 1997)). Plaintiff does not allege in his Complaint that Defendants acted with discriminatory animus. Absent this essential element, Plaintiffs Section 1985 claim is dismissed.

A claim under Section 1986 demands a prerequisite finding of a discriminatory conspiracy pursuant to Section 1985. *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994) (citing *Rogin v. Bensalem Twp.*, 616 F.2d 680, 696 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981)). As explained above, Plaintiff fails to allege that Defendants acted with discriminatory animus. Therefore, Plaintiff's

claim under Section 1986 is dismissed.

**A4. *Liability Against the Borough of Oakland
and the Borough of Oakland Police
Department***

Plaintiff seeks to hold the Borough of Oakland and the Borough of Oakland Police Department liable for the constitutional violations committed by the Defendant Officers. A municipality cannot be held liable under Section 1983 on a theory of *respondeat superior* or vicarious liability. Rather, a Plaintiff must show that the enforcement of some official policy or custom resulted in a constitutional violation suffered by the party. *Monell v. Dep't of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978); *Losch v. Borough of Parkersburg*, 736 F.2d 903, 910 (3d Cir. 1984).

The Court has carefully examined *the pro se* complaint and Plaintiffs opposition brief. While Plaintiffs brief has cited the appropriate legal standard for municipal liability, Plaintiff has failed to identify an edict or proclamation issued by Borough of Oakland police officials or a custom or policy condoned by the Defendants that resulted in the alleged constitutional violations. Absent allegations and evidence of a specific policy that caused a constitutional violation, Plaintiffs claims against the Borough of Oakland and the Borough of Oakland police dismissed.

**A5, *Fourth, Fifth and Fourteenth Amendment Claims
Against Municipal Defendants***

Plaintiff broadly asserts violations of his Fourth, Fifth and Fourteenth Amendment rights. However, such

claims must be brought under a specific statute and not directly under the constitution. *Aiken v. Twp. of Morris*, 1990 WL 119312, at *2 (D.N.J. Aug. 14, 1990)(c/rig *Curry v. A.H. Robins Co.*, 775 F.2d 212, 220 (7th Cir. 1985)). Therefore, Plaintiffs claims under Section 1983 are the appropriate means of seeking relief and any claims brought directly pursuant to the Constitution are dismissed.

A6. *Allegations Against Defendant Mary Jean Culpepper*

Plaintiff claims that his sister violated his Fifth and Fourteenth Amendment rights when she submitted false information to the police, which resulted in Plaintiffs arrest and detention for making terroristic threats. Because Defendant Culpepper, as a private party, cannot be held liable for alleged constitutional deprivations under Section 1983, all claims against her in reference to Plaintiffs wrongful arrest and prosecution are dismissed.

B. *Complaint Against Defendants Involved in Culpepper Estate Administration (02-CV-3902)*

On July 5, 2001, Defendant Mary Jean Culpepper, represented by Defendant Peter Jeffer, filed a complaint in Bergen County to remove Plaintiff as co-executor of their father's estate. See 02-CV-3902 Complaint, at ¶ 34. The state court complaint alleged that Plaintiff refused to cooperate in the administration of the estate, and that he had threatened to shoot Defendant. On or about August 2, 2001, Plaintiff filed a separate complaint in Bergen County to have Defendant Culpepper removed as co-executor. See *id.* at ¶ 38. Defendant Theresa Doyle is Special Probate Counsel in Bergen County, responsible for supervising

the Superior Chancery Division, Probate and for overseeing all Superior Court Probate actions. Apparently, Defendant Doyle physically accepted the documents Plaintiff filed with the Court.

On August 10, 2001, Defendant the Honorable Marguerite T. Simon, J.S.C. removed Plaintiff as co-executor and ordered him to leave the house by September 7, 2001. *See* Brief of Defendants' Simon and Gaeta ("Simon Brief"), at p. 4. Plaintiff then retained counsel, and filed for reconsideration of that decision. On September 21, 2001, Defendant Judge Simon not only affirmed her prior decision, but also removed Defendant Mary Jean Culpepper as co-executor and appointed an independent third-party, Defendant Joseph Rem, Esquire, as sole executor. *See* 02-CV-2963 Complaint, at ^J 51. Plaintiff filed an appeal with the Appellate Division, and on October 3, 2002, Judge Simon's order removing both Plaintiff and Defendant Mary Jean Culpepper as executors was affirmed.

Upon appointment, Defendant Rem retained Defendant Rem Zeller Law Group as attorneys to represent the estate. Defendants Robert Zeller and Rem are shareholders in the Rem Zeller Law Group. Defendant ERA Burgdorf Realtors was hired by Defendant Rem to list the Culpepper home. Defendant Mary Ellen Flannery served as the listing agent, and Defendant Randolph Wine acted as the listing broker. Defendant Rem contracted for the sale of the Culpepper home to Defendants Frank Risse and Catherine Risse.

Plaintiffs complaint also notes that on September

11, 2001, Plaintiff was scheduled to be arraigned before Defendant the Honorable Bruce A. Gaeta, J.S.C. regarding the criminal charges against him for the June 22, 2001, incident that is the subject of Plaintiffs companion civil rights case. Although this hearing was adjourned, Judge Gaeta raised Plaintiffs bail from \$10,000 to

\$25,000 and ordered him to vacate the Culpepper estate that day, otherwise a warrant would be issued for his arrest. Plaintiffs federal civil rights complaint alleges that each of the named Defendants conspired to remove Plaintiff as co-executor and to sell the Culpepper home, thus violating Plaintiffs "right to due process." Plaintiff demands declaratory, injunctive, and compensatory damages. Most of the text of the Complaint appears to incorporate legal arguments that previously were presented to the New Jersey state courts regarding Plaintiffs removal as executor of the Culpepper estate.

BL Civil Rights Claims against Defendants Judge Marguerite Simon and Judge Bruce Gaeta

Plaintiff broadly asserts civil rights violations against Defendants Judge Marguerite Simon and Judge Bruce Gaeta pursuant to 42 U.S.C. § §1983, 1985, 1986, and 1988. *See* 02-CV-3902 Complaint, at U 1. Generously construed, the Complaint alleges that Judge Simon violated Plaintiffs Fourteenth Amendment Due Process rights when she ordered Plaintiffs eviction from the Culpepper house and his removal as executor of the Culpepper estate. Judge Gaeta allegedly violated Plaintiffs Fourteenth Amendment

Due Process rights when he "enforce[d] a civil matter and

evict[ed] the Plaintiff and threatened] to jail him if he did not leave his home immediately." *Id.* at U 117.

Defendants argue, among other things, that Judges Simon and Gaeta are entitled to absolute immunity. *See* Simon Brief, at p. 15.

"It is a well-settled principle of law that judges are generally immune from a suit for money damages." *Figueroa v. Blackburn*, 208 F.3d 435, 440 (3d Cir. 2000). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority." *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978)(citation omitted). On the other hand, a judge is not immune from liability for nonjudicial actions and for actions taken in the complete absence of jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991).

In the present case, all of the actions allegedly committed by Judges Simon and Gaeta -namely, conducting hearings and issuing and signing orders- were judicial in nature. *See Stump*, 435 U.S. at 363-64 ("Disagreement with the action taken by the judge . . . does not justify depriving that judge of his immunity."). Furthermore, although Plaintiff asserts that the Defendant Judges "lacked subject matter jurisdiction" (*see* Plaintiffs Brief, at p. 8), the allegations in the Complaint do not indicate that either Judge Simon or Judge Gaeta acted in the clear absence of all jurisdiction. As Judges of the Superior Court of New Jersey, Defendants Simon and

Gaeta were empowered to handle the matters before them

that involved the Plaintiff. To the extent that Plaintiff alleges that the Defendant Judges improperly decided Plaintiffs state court matters, any legal errors do not establish that they acted in the clear absence of jurisdiction. *See id.* at 359 ("A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."). Accordingly, Defendants Simon and Gaeta are entitled to absolute immunity and Plaintiffs claims for monetary relief against them are barred. Section 1983 precludes injunctive relief against a judicial officer "for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Plaintiffs Complaint fails to allege that either of these conditions has been met, and therefore his claim for injunctive relief against Defendant Simon and Gaeta is dismissed as well.

B2. Allegations Against the Private Individuals

A liberal reading of the complaint suggests that the named private parties conspired with Judge Simon, who ordered Plaintiff evicted from the Culpepper house and removed as co-executor of the Culpepper estate. This conspiracy allegedly resulted in the deprivation of Plaintiffs Fourteenth Amendment Due Process rights, specifically his property rights in the Culpepper house. The conspiracy allegations are necessary in order for Plaintiff to attempt to establish that the private individuals were acting "under color of state law" for purposes of pleading a

Section 1983 claim. *See Melo v. Hafer*, 912 F.2d 628, 638

(3d Cir. 1990) (stating that private parties who conspire with state officials to deprive an individual of his or her constitutional rights are acting "under color of state law.").

In the present case, Plaintiff has alleged no specific facts to support the otherwise bare assertions that the private parties conspired with Judge Simon to deprive Plaintiff of his property. "A complaint cannot survive a motion to dismiss if it contains only conclusory allegations of conspiracy, but does not support those allegations with averments of the underlying facts." *Moyer v. Borough of North Wales*, 2000 WL 875704, at *2 (E.D. Pa. June 22, 2000)(c/Ymg *Flanagan v. Shively*, 783 F.Supp. 922, 929 (M.D.Pa.), *affd*, 980 F.2d 722 (3d Cir.), *cert. denied*, 510 U.S. 829 (1993)). The Complaint contains no allegations or factual support that the private parties entered into an agreement with Judge Simon or that an agreement to deprive Plaintiff of his rights even existed. The mere fact that Defendants Mary Jean Culpepper, Jeffer, Flannery, Wine, Rem, Zeller, the Risse's, ERA Burgdorf, and the Rem Zeller Law Group were involved, in various capacities, in the sale of the Culpepper house or the administration of the Culpepper estate in no way implicates them in a conspiracy to deprive Plaintiff of his constitutional rights. Likewise, Defendant Doyle's conduct - filing Plaintiffs court documents for his case that was heard by Defendant Judge Simon - does not provide a factual basis by which the Court can infer a conspiracy. Accordingly, the Complaint fails to state a claim for a Section 1983 conspiracy against the private

parties Complaint fails to state a claim for a Section 1983

conspiracy against the private parties.⁶

B3. Section 1983 Claim Against Defendant Bergen County

Plaintiff alleges that Defendant Bergen County is liable for the acts of Defendants Simon and Gaeta under the doctrine of *respondent superior*. See 02-CV-3902 Complaint, at f 17. However, these Defendants are employed by the State of New Jersey, not by Defendant Bergen County. Furthermore, even if the Defendant Judges were county employees, Bergen County cannot be held liable under a theory of *respondeat superior* or vicarious liability. See Section A4., *supra*. Thus, Bergen County is dismissed from this action.

CONCLUSION

Judge Marguerite Simon, Judge Bruce Gaeta, Rem Zeller Law Group, Joseph Rem, Robert Zeller, Theresa Doyle, ERA Burgdorf Realtors, Mary Ellen Flannery, Randolph Wine, Peter Jeffer, Mary Jean Culpepper, Bergen County, Frank Risse, Catherine Risse, Captain Robert Hammerle, Chief James O'Connor, Borough of Oakland, Officer Mark Piercy, Borough of

⁶To the extent that Plaintiff has asserted a state law claim for slander against Defendant Rem Zeller Law Group, this allegation must be dismissed as a matter of law because it is protected by the litigation privilege. Plaintiff claims that Defendant Rem Zeller Law Group made slanderous statements about Plaintiff in a Respondent's Brief filed with the New Jersey Supreme Court. This brief was filed in support of a motion to deny certification of Plaintiff's appeal of his removal as

co-executor.

Litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Thomas v. Ford Motor Co.*, 137 F.Supp.2d 575, 582 (3d Cir. 2001) (quoting *Hawkins v. Harris*, 141 N.J. 207, 216 (1995)). Defendants' Brief clearly satisfies all four elements, and thus any statements in the brief are immune from liability.

Oakland Police Department, Officer Frank Fiori, John Conte, Jr., and Officer Brian Coglin are dismissed entirely from this action and Plaintiffs consolidated Complaint is dismissed in its entirety.

S/William-Martini, U.S.D.J.

Date: July 11, 2003

End Page
Exhibit J